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In the Supreme Court of the United States.

October Term, 1933

No. 133.

R. H. STEARNS COMPANY, Boston, Massachusetts,
Petitioner,

vs.

THE UNITED STATES.

MOTION FOR RECONSIDERATION

HOWE P. COCHRAN,
Counsel for Petitioner.

W. N. WOOD,
Of Counsel.

PRESS OF GIBSON BROS., INC., 1312 KYE STREET N.W., WASHINGTON, D. C.

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R. H. STEARNS COMPANY, Boston ,Massachusetts,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

MOTION FOR RECONSIDERATION

The petitioner above-named respectfully moves that this court reconsider its opinion for the following reasons:—

This suit was brought for the sum of $14,928,07, with such interest as is allowable at law.

The facts found by this court are as follows:—

Returns were filed by the petitioner for the fiscal years ending July 31, 1917, and July 31, 1918, and the taxes paid. An audit was made by the Commissioner of these returns, and an overpayment was found for the fiscal year ending July 31, 1918, in the sum of $14,928.07, and an additional assessment was found for the fiscal year ending July 31, 1917, in the amount of $20,757.14. (Said additional assessment was made on June 26, 1923.) The schedule of overassessments showing the overpayment of $14,928.07 for the fiscal year ending July 31, 1918, was signed March 1, 1924. The Collector signed this schedule

together with the schedule of refunds and credits on June 12, 1924, and sent them to the Commissioner, and on June 28, 1924, the Commissioner signed the schedule of refunds and credits definitely allowing the credit of $14,928.07, overpaid for the fiscal year ending July 31, 1918, to be credited to the additional assessment (assessment June 26, 1923) for the fiscal year ending July 31, 1917, in the amount of $20,757.14.

The Revenue Act of 1924 became effective on June 2, 1924, and since the schedule of refunds and credits was signed by the Commissioner on June 28, 1924, allowing this credit interest on the credit is governed by Section 1019 of the Revenue Act of 1924, (*Swift* v. *United States*, 282 U. S. 468) and consequently interest at 6% is due the petitioner on $14,928.07 from December 17, 1919 (the date it was paid) to June 26, 1923. (the date of the additional assessment against which it was credited).

The petitioner filed two suits in the Court of Claims at the same time. The contention in No. L–187, Court of Claims, which is the case before this court, was that the collection of the additional assessment for the fiscal year ending July 31, 1917, was barred on June 28, 1924, when it was paid by credit from the overpayment for the fiscal year ending July 31, 1918. The contention, of course, was that the credit was illegal and that the overpayment was due the petitioner with interest from the time it was paid down to within thirty days of the time it was refunded. The contention in No. L–186, Court of Claims, (the other suit) was that the credit was legal and that interest was due under Section 1019 of the Revenue Act of 1924. It can readily be seen that if the petitioner's contention in the case before this court had prevailed, namely, that the credit was void, he would have been entitled to no interest under the other suit (No. L–186, Court of Claims). But the very fact that the court held

the credit was legal makes interest due under the set of facts found by this court and makes the other suit (No. L–186, Court of Claims) a good cause of action.

Petitioner's attorney and respondent's attorney talked over the question of consolidating these two suits or going ahead with each suit separately. It was suggested by respondent's attorney that since interest was due the petitioner in any event, petitioner would be paid sooner if a motion was filed to suspend action on the suit for interest as due under the Swift case; since if the suit before this court was lost then respondent would settle the suit for the interest. Accordingly, the suit before this court (No. L–187, Ct. Cl.) was tried to test the legality of the credit and a motion to suspend proceedings was filed in case No. L–186, Ct. Cl. The motion stated that while the case was governed by the Swift case, nevertheless action should be deferred during the pendency of suit No. L–187, Ct. Cl.

Now the respondent seeks to dismiss the petition in suit No. L–186, Ct. Cl., on the grounds that the decision by this court in suit No. L–187, Ct. Cl. (No. 133, October, 1933 Supreme Court) renders the matter res adjudicata. As to the question of res adjudicata it seems clear to the petitioner that the decision in No. L–187, Ct. Cl. (No. 133, October, 1933, Supreme Court) did not rule on the question presented in No. L–186, Ct. Cl. It merely established a legal basis for the application of the rule for which petitioner was contending in No. L–186, Ct. Cl. If case No. L–187, Ct. Cl. covers the point presented by No. L–186, Ct. Cl., then the petitioner respectfully petitions this Honorable Court to amend its decision in No. L–187, Ct. Cl., (No. 133, October, 1933, Supreme Court) to the extent of allowing to the petitioner interest on $14,928.07 from date said tax was paid to the date of the additional assessment against which it was credited.

The facts found by this court show interest due the petitioner under the Swift decision and it respectfully asks this court issue a mandate to the Court of Claims allowing this interest, whereupon petitioner will dismiss suit No. L–186 now pending in the Court of Claims.

This motion is filed in good faith and not for the purpose of delay.

Respectfully submitted,

HOWE P. COCHRAN,
Counsel for Petitioner.

WILLIAM N. WOOD,
Of Counsel.